BENCHNOTE 1

Ordering Medical Services for a Child Over the Religious Objection of a Parent

by Honorable Donald S. Owens
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The telephone rings. Sleepily you open your eyes, get out of bed and answer the phone, inwardly groaning as you see it is 2:00 a.m. The voice on the phone is that of a doctor from your local hospital informing you that a newborn baby needs an immediate blood transfusion due to an Rh incompatibility with his mother. The doctor tells you that the parents refuse to consent to the transfusion because of their religious belief. He adds that without a transfusion very soon, the baby will suffer brain damage and possibly death. What can you do? What should you do?

Medical neglect of a child is a basis for Family Court jurisdiction. MCL 712A.2(b); MSA 27.3178(598.2)(b). Some question, however, whether a parent's refusal to consent to medical treatment for a child constitutes medical neglect when the refusal is based on sincerely held religious beliefs. Historically, courts have had little difficulty finding medical neglect when the objection of the parent is based upon a religious belief which is the product of mental illness or a religion invented by the parent.

Much more difficult are objections to medical treatment which are based on religious beliefs held by generally recognized religious denominations. Some argue that if the parents' religious belief is sincere and they belong to a generally recognized religious denomination, a court has no business overruling their decision regarding medical care for their own children. Since medicine is not infallible, and physicians themselves often disagree, parents must often decide between competing advice of physicians as to what treatment is in the best interest of their children. This is not considered neglect unless the parents' decision was patently unreasonable and the child suffered, or could have suffered, serious harm as a result. The same analysis applies to parental decisions based on religious beliefs. If the child is not in danger of serious harm, most courts will respect the parents' decision. If, on the other hand, competent medical testimony establishes that the child suffers a significant risk of serious harm, courts will usually intervene to protect the child and order treatment over the religious objection of the parents.

Those who object to the court's authority to order medical treatment over the religious objection of the parents often cite MCL 722.127; MSA 25.358(27), a provision of the Child Care Organizations Act, which provides that: "Nothing in the rules adopted pursuant to this act shall authorize or require medical examination, immunization, or treatment for any child whose parent objects thereto on religious grounds." They may also cite MCL 722.634; MSA 25.248(14), a provision of the Child Protection Law, which provides that: "A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian. This section shall not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child's health requires it nor does it abrogate the responsibility of a person required to report child abuse or neglect." Both of these provisions appear to protect the right of parents to object to medical treatment on religious grounds.

The provision of the Child Protection Law implies that such parental conduct does not constitute neglect, but the law does not prohibit the court from ordering treatment. How this could be done is not explained. The Family Court only has authority to enter orders regarding juveniles if the juvenile comes within the jurisdiction of the court. However, if the defined behavior is not neglectful, the child obviously does not come within the jurisdiction of the court, and the court has no authority to order treatment for that child. In fact, this proviso of the law does not use the term "neglect," but states that the parental refusal to consent to medical treatment is not "negligent." This is a term from tort law and not from child abuse and neglect law. Presumably, the Legislature meant "neglectful," although it is conceivable by using the term "negligent,"

the Legislature meant to protect the parents from a tort action by the child's estate, but still permit the Family Court to take jurisdiction on the basis of neglect.

To the extent both of these statutory provisions attempt to prevent the court from protecting children whose lives or health are in serious danger, I believe that they are unconstitutional denials of equal protection to children. In a case which did not involve denial of medical treatment, but involved other attempts by the state to protect children, and which involved the religious convictions of their parents, the U.S. Supreme Court in *Prince v Commonwealth of Massachusetts,* 64 S Ct 438 (1944), states a rationale which is equally applicable to the situations we have been discussing: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they [the children] have reached the age of full and legal discretion when they can make the choice for themselves."
Id., at 444.

If you decide, based on the foregoing analysis, that you have the authority as a judge to override the sincerely held religious convictions of the parents in a particular case, how should you proceed? During court hours, a petition may be filed and a preliminary hearing held. Unfortunately, most of these cases arise after court hours. In those cases, some judges verbally authorize placement of a child in the hospital based on a report of suspected medical neglect of the child. Once the court takes custody of the child and orders placement in the hospital, the court then has authority and responsibility to provide whatever medical treatment is necessary for the child.

While this approach has merit, especially in areas where these cases are numerous, it never gives the parents their "day in court." By the time a preliminary hearing or trial takes place, the issue is moot since the medical treatment has been already authorized and rendered. The approach I favor (and practice) is for the judge to conduct a preliminary hearing at the hospital. A protective services worker (if available) or a hospital employee can handwrite a petition requesting jurisdiction. The judge can then hold a preliminary hearing in a room in the hospital, at which time the petition can be read to the parents, the doctors can testify under oath regarding the need for the treatment, the parents can have an opportunity to state their position, and the judge can then decide whether to authorize the filing of the petition or, if that is deferred until counsel can be obtained, to authorize the placement of the child and approve the medical treatment requested. Of course, having attorneys present for the parents and child (and even the petitioner) is highly desirable, though is usually not practical during the middle of the night. After such a hearing, the judge can handwrite a preliminary order taking custody of the child, placing the child in the hospital and authorizing specified medical treatment for the child.

While I do not believe this approach is required by the law, it does give the parents an opportunity to be heard in the event the judge orders the medical treatment, and it gives the judge an opportunity to clearly assess the true need for, and the urgency of, the treatment. Sometimes, after such hearings, treatment can be delayed and may even become unnecessary. If you order medical treatment, a wise course might be to order the minimum treatment necessary to preserve the life or the health of the child, rather than giving carte blanche to the medical staff. I often require the physician to obtain my approval for each medical procedure as it becomes necessary. In emergency situations, the physician must make reasonable efforts for a certain amount of time—usually 15 minutes—to contact me before proceeding with the treatment. All of these types of orders are designed to minimize the medical treatment the child will receive over the objection of the parents.

It is my opinion that sincerely held parental religious beliefs should be given great weight by the court and that orders authorizing medical treatment should only be entered when absolutely necessary and only to the minimum extent required. Because of the emergency nature of most of these proceedings, it is not possible to have a trial before the medical treatment is ordered; a preliminary hearing is usually the most that can be accomplished.

If medical treatment is ordered over their religious objections, some parents remain angry, even after the child recovers. Most, however, are happy that their child is alive and that, because the judge was willing to take appropriate action, they did not have to violate their religious beliefs.

Note: There is also an argument that MCL 722.634; MSA 25.248(14), provides a Family Court with the authority to order medical services for the child.

BENCHNOTE 2

An Overview of "Reasonable Efforts" Requirements

by Susan L. Leahy
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The Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, established guidelines for child welfare services delivery including an emphasis on permanency for children in foster care by mandating that courts review service agencies' actions to assure "reasonable efforts" have been made to (1) prevent the child's removal from the home and (2) to return the child home. The law reflected a concern that imprudent removals of a child from his family presented unnecessary risk of harm. In addition, continued placement in care without benefit of efforts to reunite the child and family contributed to "foster care drift," multiple foster care moves, and concomitant risks to the child. To enforce agency compliance with the intent of the law, Title IV-E (federal) funding for services was tied to the judicial determination that the agency had indeed made reasonable efforts to prevent removal or reunify the family.

Over the years there has been much ambiguity as to just what are "reasonable efforts." Does it mean efforts to reunify **must** be made in every case? Does it mean documented effort no matter what the circumstances? Are there cases where **no effort** at all would be the most reasonable thing to do?

In an effort to define circumstances under which efforts to reunify the family may not be reasonable, the Michigan Legislature passed 1997 PA 168, which was subsequently amended by 1998 PA 383 and 1998 PA 428. This legislation now requires that the Family Independence Agency submit a petition for termination of parental rights at initial disposition when the following types of abuse are alleged if a parent is the suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to eliminate the risk:

- abandonment of a young child;
- criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate;
- battering, torture, or other severe physical abuse;
- loss or serious impairment of an organ or limb;
- life-threatening injury; or
- murder or attempted murder.

In addition in 1997, Congress passed Public Law 105-89, the Adoption and Safe Families Act (ASFA), which further clarifies when efforts to reunify are reasonable, by noting that, " . . . the child's health and safety shall be the paramount concern." 42 USC 671(a)(15)(A). It provides that reasonable efforts shall be made to preserve and reunify families:

"(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and

"(ii) to make it possible for a child to safely return to the child's home."

42 USC 671(a)(15)(B)(i)-(ii).

This provision goes on to say that "if continuation of reasonable efforts . . . is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child." 42 USC 671(a)(15)(C).

It distinguishes that reasonable efforts shall **not** be required if a court of competent jurisdiction has determined that:

"(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

"(ii) the parent has--

"(I) committed murder (which would have been an offense under section 1111(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

"(II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

"(III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or

"(IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or

"(iii) the parental rights of the parent to a sibling have been terminated involuntarily. . . ."

42 USC 671(a)(15)(D).

Lastly, it directs that if a court of competent jurisdiction determines that it is not necessary to make reasonable efforts because the parent committed an egregious act (listed above), a permanency planning hearing shall be held for the child within 30 days of that determination. It allows that reasonable efforts to place a child for adoption or with a legal guardian may be made **concurrently** with reasonable efforts to return the child home. 42 USC 671(a)(15)(E) and (F).

Determination by the court that reasonable efforts have not been made when efforts should have been made results in ineligibility for Title IV-E funding. Alternative funding sources such as state ward board and care or county child care may be utilized.

The Family Independence Agency is committed to assuring that its staff and those employed under contract make reasonable efforts in all cases where efforts to reunify or prevent removal would be reasonable. Courts concerned about the quality of services provided may wish to address such concerns with the local county director. Benchnote 3 contains a summary of the requirements for maintaining Title IV-E funding of interest to courts.[1]

1. There are several eligibility requirements for Title IV-E (ADC-FC) funding. However, only those of interest to courts are covered in the following benchnote.

BENCHNOTE 3

What Courts Should Know About Maintaining Title IV-E Funding Eligibility

by Linda Glover
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Federal funding flows from Title IV-E of the Social Security Act to each state child welfare agency (Family Independence Agency in Michigan) and represents a core source of income for costs associated with removing children from their families and placing them in foster care. Fifty percent of the state costs associated with IV-E eligible children can be reimbursed. (Certain training costs can be reimbursed at the 75 percent level.) These funds are granted as an entitlement for all eligible children and there is currently no cap on the total reimbursement a state can claim for eligible expenses.

In 1980, the Adoption Assistance and Child Welfare Act (Public Law 96-272, also known as the "reasonable efforts" legislation), amended the Social Security Act and set out the requirements for IV-E reimbursement eligibility. Requirements included making the courts responsible for determining whether reasonable efforts had been made to prevent removal from the parental home, or to reunite the children with their parents if removal was justified. The "reasonable efforts" part of this statute came under scrutiny in the 1990's as being unclear and possibly leading some courts and agencies to attempt to maintain or reunite children with their families even when it was not safe to do so.

In 1997, Public Law 105-89, better known as the Adoption and Safe Families Act (ASFA), was passed in an attempt to reform Public Law 96-272. At the time this "benchnote" was being written, the federal regulations which give guidance to states relative to compliance issues were still in draft form. IV-E eligibility can be complicated, and a "State Plan" must be filed with the Secretary of the Department of Health and Human Services outlining the steps the state will take to insure full compliance with the statute.

However, there are significant pieces of ASFA which are fairly clear. Courts generally are very interested in complying with all IV-E eligibility requirements because failure to do so requires that FIA declare a child ineligible for IV-E funding, hence making that child a responsibility of the county child care fund. What follows is a bulleted outline of some of the most significant portions of ASFA with relevance or interest to the courts.

- There is an explicit emphasis on child safety as part of permanency planning.
- Time frames for review hearings and permanency planning hearings are accelerated, but generally Michigan law requires still more stringent time frames.
- Unless the child is being cared for by a relative, the state documents a compelling reason not to terminate parental rights, or the state has failed to provide necessary services for family reunification, states must initiate termination proceedings for children who have been in foster care 15 of the most recent 22 months.
- Judicial findings that reasonable efforts[1] were made by the agency to prevent removal or to reunite the child are still necessary at each hearing, *unless* the court finds that reasonable efforts to prevent removal or to reunite the child with his/her family need not be made because the acts of the parents

1. For a discussion of the "reasonable efforts" requirement, see Benchnote 2.

subjected the child to aggravated circumstances and/or reasonable efforts to reunite the child with his/her family are inconsistent with the permanency plan for the child.

- If reasonable efforts to reunify are determined by the court to be unnecessary for reasons mentioned above, a permanency hearing must be held within 30 days of the determination.

- If the reasonable efforts to reunify are inconsistent with the permanency plan, then the court must find at each hearing that the agency is making reasonable efforts to secure an alternative permanency placement in a timely manner.

- The federal statute continues to indicate that the child's placement and care are the responsibility of the state agency administering the State Plan or any of its contract agencies. This has been found to mean in Michigan that courts MAY NOT specify placements. FIA indicates in their manual that the "court may not order, but may recommend, specific placements or types of placement. If the court order specifies a particular placement such as a specific foster home, Title IV-E funding is not available under federal standards. (FIA *Services Manual, Children & Youth,* Item 722.1, p 7 [ISS 2/1199]). This provision has been challenged and the Court of Appeals decision in *Craven v Dep't of Social Services,* 132 Mich App 673 (1984), is utilized to support the FIA position. If the court orders a specific placement, it appears that the costs for out-of-home care will become the responsibility of the county child care fund.

- A permanency hearing must be conducted at 12 months after a child enters foster care, which is similar, but not identical to Michigan law, which requires a permanency planning hearing within 364 days of the filing of the original petition.

- Concurrent permanency planning, for both reunification and adoption, guardianship, or some other permanent plan, is permitted.

While the statute has taken effect, there will be no doubt many efforts in the next year or so to interpret and actualize the statute in practice. The regulations, which should be available in the near future, will also provide guidance as to implementation of the statute. Courts can gain more information from the National Council of Juvenile and Family Court Judges, P.O. Box 8970, Reno, NV 89507

BENCHNOTE 4

An Overview of Representation of Children

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The interests of a child who finds himself or herself entangled in the legal system, just like those of an adult entangled in the legal system, are better served by the appointment of an attorney for the child. The law in Michigan has historically been unclear as to the authority to appoint an attorney for the child, and once appointed, the ethical and legal responsibilities of that attorney in representing the child. Much of the confusion centers on the general and varied use of certain words to define the child's advocate in the statutes, such as counsel, legal counsel, attorney, non-attorney guardian ad litem, and an attorney as guardian ad litem. In addition, there is the question of whether the traditional role of the lawyer to his or her client applies equally to the representation of a child.

The confusion over terminology, not only in Michigan, but nationwide, has led to debate over whether the attorney for the child represents "the best interests of the child" or the "wishes of the child." Michigan, in an attempt to more appropriately concentrate the discussion on providing for children and their needs, has passed a series of bills, commonly referred to as the Binsfeld Legislation. The intent of the bills is to add clarification to the role of the advocate and provide specific definition of the terms included in the legislation. To understand the changes, it is important to understand the confusion in the law that led up to the new legislation.

Since 1974, the federal government, as a condition of receiving federal child welfare funds, has required that each state provide for the appointment of a guardian ad litem (GAL) in civil protection proceedings. The federal mandate, however, did not define the duties or the role of the guardian ad litem. Michigan, although historically recognizing the need for representation of children in legal proceedings, also failed to clearly delineate the roles for representatives of the child. Some of the laws contained internal ambiguities, while others were inconsistent with each other. For instance, in the Child Protection Law, MCL 722.630; MSA 25.248(10), required the appointment of "counsel for the child" and directed that counsel "shall in general, represent the best interests of the child." Further, the Juvenile Code required the appointment of an "attorney" for the child in the same child protective proceedings. (MCL 712A.17c; MSA 27.3178(598.17c).) Thus the confusion was compounded: is the role and responsibility of the lawyer in the child protective situation to act as "counsel for the child," to present the "best interests of the child," or as an "attorney" within the traditional attorney-client role?

The laws concerning guardianship proceedings also did not define the attorney's responsibility. The statute provided for a permissive appointment of an "attorney" but again did not clarify whether the role was the "best interests of the child" or the traditional role of the attorney. (MCL 700.427(4); MSA 27.5427(4), and MCL 700.437(3); MSA 27.5437(3).) Similarly, in child custody proceedings, the language of the statute provided discretion for the court to appoint either a guardian ad litem for the child or counsel for the child. (MCL 722.27; MSA 25.312(7).) Adding to the confusion was the allowance for non-attorneys as guardian ad litems to represent the children. In addition to the varied language of the statutes were the local practices and cultures of the courts to adopt the guardian ad litem role as advocates for the "best interests of the child" as an "arm of the court," while the legal counsel for the child was often meant to serve in the more traditional attorney-client relationship.

Many times for the appointed attorney, the desired outcome for the child might be the same regardless of which role is defined. However, there also are circumstances where the desired outcome is different. One such example is where the desired goal of the child conflicts with what others might deem as the "best interests of the child." Without appropriate definition of his or her role, the responsibility of the attorney becomes mired in the process. Additionally, depending on the role, corollary issues can arise such as: Does attorney-client privilege arise only in one role and not the other? Is discovery of the attorney's work product available under one role and not the other? Can an attorney appointed as a guardian ad litem be called as a witness? Does the attorney's obligation run to the court as an "arm of the court" or is the attorney's allegiance to the child only? Or, as some have argued, is representation by an appointed attorney for the "best interests of the child" the equivalent of abandoning zealous representation of the "child's interests"?

The above backdrop of the problem gave rise to the attempts in the Binsfeld Legislation to add clarification under the law, to define the role of the advocates for the child, and, more importantly, give specific direction to the mandates under the law in representing the child. The underlying premises of the law are:

1 When an attorney is appointed to represent the child, the attorney will be a lawyer-guardian ad litem whose **duty is to the child**, not the court.

2 The lawyer-guardian ad litem shall represent "the best interests of the child," however, not to the negation of zealously fulfilling the traditional attorney-client role. The "best interests" determination should include the wishes of the child, but not unlike an adult, the attorney's primary responsibility should be to competently and conscientiously represent a client's legitimate interests.

3 If the lawyer-guardian ad litem, in fulfilling his or her duties, including meeting with the child, makes a "best interest" determination that is inconsistent with the child's wishes, the lawyer-guardian ad litem is to approach the court and inform the court of the conflict. The court, based on the age, maturity and nature of the difference, may appoint legal counsel to represent the child's wishes, but must continue the lawyer-guardian ad litem. Note: This is not unlike the criminal lawyer informing the court that a juvenile, acting on his or her own accord, has decided to take an action against the attorney's advice.

4 When an attorney is appointed to represent the child, whether in child protective proceedings, guardianship or child custody proceedings, the attorney shall be a lawyer-guardian ad litem. While each proceeding has its own unique circumstances, it is imperative that the role be consistent. As such, all the duties and provisions of the lawyer-guardian ad litem cited in the juvenile code, MCL 712A.17c(7); MSA 27.3178(598.17c)(7), MCL 712A.17d; MSA 27.3178(598.17d), and MCL 712A.13a(1)(e)(i)-(iii); MSA 27.3178(598.13a)(1)(e)(i)-(iii), are the same provisions that apply to guardianship actions under MCL 700.427 et seq.; MSA 27.5427 et seq., child custody actions under MCL 722.22 et seq.; MSA 25.312(2) et seq., and appointments under MCL 722.630; MSA 25.248(10), of the Child Protection Law. The only additional duty specific to the Child Custody Act is found in MCL 722.24(3); MSA 25.312(4)(3), specifying that the lawyer-guardian ad litem may file a written report and recommendation. The court shall not, however, admit the report and recommendation into evidence unless all parties stipulate the admission. The parties may make use of the report and recommendation for purposes of a settlement conference.

5 With the implementation of the Family Court Division, where the intent is for one judge to hear all the legal proceedings involving the child, coordination between the proceedings is extremely important. It is anticipated in time, with trial court unification, and now with the passage of this legislation, that one lawyer-guardian ad litem will be appointed to represent the child in any and all proceedings affecting his or her interests.

6 The court still retains the discretion to appoint other advocates. However, the law now separately defines the guardian ad litem as a non-attorney, whose duty is to the court, to represent the "best interests of the child." While there may be good reasons to allow the court discretion to appoint non-attorneys to assist the court, this should not be to the negation of the appointment of a lawyer-guardian ad litem.

7 The lawyer-guardian ad litem is encouraged to advocate and pursue remedies in other administrative forums related to the child's interest.

Lastly, the new statutes outline required duties of the lawyer-guardian ad litem (see paragraph 3), above). Underlying these duties are the principles that:

- The lawyer-guardian ad litem have an understanding of child development and knowledge of the human service delivery systems, agencies and services available to children.

- The lawyer-guardian ad litem should seek assistance of others, including CASAs and other professionals, in fulfilling his or her duties and responsibilities on behalf of the child.

BENCHNOTE 5
Court Appointed Special Advocates (CASAs)

by Patricia Wagner
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Introduction

The role of the CASA, or Court Appointed Special Advocate, was originally conceived to allow a lay volunteer to act on behalf of the child in a guardian ad litem (GAL) role. There are four generally recognized models for CASA programs: the "CASA as GAL"[1] model, where CASAs substitute for the attorney, except in proceedings when the case goes to trial; the "attorney-CASA" model, where the attorney and CASA work together; the "CASA-Court" model, where the CASA is not a party to the case but investigates and submits written reports and often testifies; and the "monitor" model, where the CASA monitors court orders but has no direct contact with the child.

The Michigan Association of Court Appointed Special Advocates (MACASA) is facilitated by Children's Charter of the Courts of Michigan, Inc., and serves as a support network for the county programs. MACASA is working under a grant from National Court Appointed Special Advocate Association (NCASAA) to establish five new programs.

Additionally, MACASA and NCASAA have created standards for the programs and volunteers. Children's Charter of the Courts of Michigan, Inc., has been working on legislation or amendments to court rules that would legally define the role of CASAs in Michigan and would hopefully provide immunity from liability suits.

Roles and Responsibilities of CASAs

The individual appointed by the court to serve as the child's CASA must perform ten interrelated duties:

The CASA must:

1 Act as an independent gatherer of information whose task it is to review all relevant records and interview the child, parents, social workers, teachers and other persons to ascertain the facts and circumstances of the child's situation.

2 Ascertain the interest of the child taking into account the child's age, maturity, culture, and ethnicity consistent with providing the child with a safe home, taking into account the need for family preservation and permanency planning.

3 Seek cooperative solutions to the child's situation within the scope of the child's interest and welfare.

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1. Beginning March 1, 1999, the court is required to appoint a "lawyer-guardian ad litem" for the child in a child protective proceeding. See MCL 712A .17d; MSA 27.3178(598.17d). In addition, the court may appoint a "guardian ad litem," who need not be an attorney, for the child, or for any party. See MCL 712A.17c(10); MSA 27.3178(598.17c)(10), and MCR 5.916.

4 Provide written reports of findings and recommendations to the court at each hearing to assure that all the relevant facts are before the court and ensure that appropriate motions are filed seeking child-centered relief.

5 Appear at all hearings to represent the child's interests, providing testimony or ensuring that appropriate witnesses are called and examined.

6 Explain the court proceedings and the role of the CASA to the child, when appropriate, in language and terms that the child can understand.

7 Ask that clear and specific orders are entered for the evaluation, assessment, services, placement, and treatment of the child and the child's family.

8 Monitor implementation of service plans and dispositional orders to determine whether services ordered by the court are actually provided in a timely manner, and are accomplishing their desired goal. Monitor the progress of a case through the court process and advocate for timely hearings.

9 Inform the court promptly if services are not being made available to the child and/or family, if the family fails to take advantage of such services, if services are not achieving their purpose, and bring to the court's attention any violation of orders, new development, or changes in the child's circumstances.

10 Advocate for the child's interests in mental health, educational and other community systems.

In order to accomplish these goals, the following conditions must exist:

1 **Sensitivity to the individual child's needs**CASAs should be knowledgeable about a child's culture and ethnic backgrounds, as well as age-related abilities. The CASA should gain the child's trust by having regular, face-to-face contact with the child and be able to speak the child's native tongue or have an interpreter assigned.

2 **Independence**
The CASA must be objective and independent. There should be no conflict of interests. The CASA must be permitted to conduct a thorough fact-finding investigation. The appointment order should allow the CASA to speak for the child in other courts or proceedings such as divorce, criminal and all juvenile proceedings.

3 **Selection and training**
The CASA must be carefully screened before being appointed and receive a minimum of 30 hours of training on issues related to the performance of the duties detailed above. CASAs should receive ongoing training throughout their appointment.

4 **Early appointment**
The CASA should be appointed at the earliest stage in the court proceedings and should remain involved until the child is in a legally sanctioned permanent placement and the case is dismissed by the court system. The CASA role during the initial stages of a case, prior to adjudication, is to gather facts related to the child's past and current situation, to determine what services have been previously provided to prevent foster care placement, and to assist in providing services that are necessary to meet the child's needs and to reunify the family.

5 **Status**
In most cases the volunteer should be a party or have the same rights as other parties to the proceedings. In all cases the volunteer should have access to an attorney who can file legal motions,

request hearings before the court when the court's orders are not being followed or are determined not to be in the child's best interests, examine and cross-examine witnesses and subpoena witnesses. The volunteer should be entitled to receive copies of all requests for discovery and responses, copies of correspondence and other appropriate documents and participate in the proceedings.

6 **Access to information**
The CASA must have complete access to all information related to the child and the child's situation. Such information may include: records of the Family Independence Agency, law enforcement, the court, schools, public health, medical providers, substance abuse treatment and mental health history. The CASA must also be allowed to interview the child, parents, social service staff, law enforcement personnel and any other individuals who have knowledge of the child if local rules of ethics allow.

7 **Immunity**
A CASA must have immunity from liability when performing duties described in the job description unless an act, or failure to act, is willfully wrongful or grossly negligent.

8 **Accountability**
Individuals serving in the role of CASA must be held accountable for their performance by participating in regular performance evaluations.

BENCHNOTE 6
Kinship Care

by Ron Apol
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Kinship programs involve the extended kinship network in providing care and protection for children in need of placement due to parental child abuse or neglect. The programs utilize family group conferences to divert children from the formal foster care system, thus providing culturally competent family and community network intervention. Kinship care may be used for family support, temporary care, emergency placement, or long-term care.

Kinship programs employ a team approach between children's protective service workers and the Kinship staff. The team identifies concerned members of the child's kinship network, convenes a family group meeting, develops a plan for the child's safety, and provides supports to kinship or community caregivers and parents. The process ensures that children in need of permanent families will receive timely support, assessment, and casework services with minimal court involvement. This innovative approach to permanency planning recognizes the important connections of the child, the family, and the community.

Michigan's Family Independence Agency formally recognized the benefits of kinship care in April of 1997 when it incorporated aspects of kinship care policies and principles into the service policies of its Division of Children's Protective Services. The new policy states that, provided the placement will meet the health and safety needs of the child, the preferred placement for children is within the kinship family network. This network includes kin, who are defined as blood relatives or relatives by marriage, and "fictive" kin, who are defined as non-blood or marriage-related adults who have a psychological/emotional bond with the child and are identified as "family." CPS workers are also required to identify and use kinship care relationships during an investigation and they must explore kinship care options with family and/or the fos-

ter care worker. While children may be placed with kin without legal guardianship, "fictive" kin must have legal guardianship for a non-relative child to be placed in their home. If necessary, CPS workers are to work with "fictive" kin to secure legal guardianship. The state has such strong confidence in the effectiveness of kinship care that if a child is not placed within the kinship network, CPS workers are required to document the steps taken to place the child in kinship care and the reasons why the child was not placed in such care. Kinship care families may be eligible for various services (food stamps, cash assistance, etc.) in order to prevent placement in non-kinship foster care. If services are needed, CPS workers should assist the family in securing access to them. By incorporating the principles of Kinship programs, the Family Independence Agency seeks to further its mission of strengthening families by empowering them to help each other.

There are various Kinship programs throughout the state. Funding provided by The Kellogg Foundation has been used to adapt the family group conference model, which originated in New Zealand, to Michigan. In Grand Rapids, the family conference model was utilized to develop "The Family and Community Compact" through a community permanency planning initiative. The Grand Rapids Foundation administers this particular kinship program.

BENCHNOTE 7

Guardianship as a Permanency Plan: Stability or Legally Imposed Chaos?

By Frank Vandervort
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Introduction

Much attention has recently been focused on increasing courts' options for achieving permanency for children who come into contact with the child welfare system. Among those options that have been codified is the authority for the family court judge to appoint a legal guardian and dismiss the child protection case. MCL 712A.18(1)(h); MSA 27.3178(598.18)(1)(h). While such a resolution may provide a convenient means of resolving a child protection case, it may well result in living situations that are in fact not permanent. Indeed, the appointment of a legal guardian may well cast the child and family into legal chaos.

Michigan's Guardianship Law

Michigan's scheme for the appointment of a legal guardian for a child is not intended to be permanent. See MCL 700.424c; MSA 27.5424(3), MCL 712A.2(b)(3) and (4); MSA 27.3178(598.2)(b)(3) and (4), and MCL 712A.19b(3)(d) and (e); MSA 27.3178(598.19b)(3)(d) and (e). Indeed, when the court appoints a limited guardian, the court *must* approve a Limited Guardianship Placement Plan,[11] similar to the case service plan required in a child protection case, that is intended as a map for the parent to regain full custody of her or his child. MCL 700.424a(3); MSA 27.5424(1)(3). Although the appointment of a legal guardian suspends a parent's rights to a child, "The suspension of parental rights under this section does not prevent the parent or parents from filing a petition to terminate the limited guardianship at *any* time." MCL 700.424a(5); MSA 27.5424(1)(5) (emphasis added). If the parent petitions to terminate a limited guardianship and has "substantially complied" with the limited guardianship placement plan, "the court shall terminate the limited guardianship." MCL 700.424c(3); MSA 27.5424(3)(3).

1.See SCAO Form PC 50.

The Limited Guardianship Placement Plan is intended to outline what the parent will and will not do. For example, parents may be required to provide financial support, adhere to a schedule of visitation with the child or attend drug treatment. In most cases, however, the parent will have already failed to do many of these things even with the support of a caseworker and the FIA to pay for services. It is highly unlikely that with no assistance that same individual will be in a position to procure services or comport their behavior to the requirements of the plan. It goes without saying that if the parents followed through with and benefited from such plans, the court would not be in a position to consider guardianship or other permanent options for the child.

The appointment of a full guardian[1] does not resolve this concern. A parent may petition the court at any time to terminate a full guardianship. MCL 700.424(4); MSA 27.5424(4). Once the parent does so, the court must generally terminate the full guardianship within one year after the hearing on the petition to terminate. MCL 700.424c(4)(b); MSA 27.5424(3)(4)(b). Nothing in Michigan's guardianship statute prevents a parent from filing a petition to terminate the guardianship immediately after it is put in place. This would generally entitle the parent to regain custody of the child within one year. While the court may, if there is "substantial disruption of the parent-child relationship" and clear and convincing evidence that maintaining the guardianship is in the child's best interests, deny the parent's request to terminate the guardianship, nothing in the statute prohibits the parent from simply filing another petition. MCL 700.424c(4)(c); MSA 27.5424(3)(4)(c).

An attendant problem with these cases is that the child, who is not a party to a guardianship proceeding as in a child protection case, the parent nor the guardian is entitled to the appointment of a lawyer. This may result in one party having a lawyer and the other being unrepresented in subsequent proceedings if the child protection case is dismissed after the guardian is appointed.

In addition to the strictly legal problems engendered by the use of guardianship as a form of permanency, there are many practical problems. Since parental rights are suspended, rather than terminated, and because parents regularly have access to children under guardianship, there are inevitably disputes over rights and responsibilities between the guardian and parent vis-à-vis the child. Moreover, with no neutral party such as a foster care worker to supervise these situations, the guardian may become overwhelmed with the parents' behavior and simply give up. Anecdotally, the author has been involved in a number of these cases where, as a result of the legal and extralegal actions of a parent, the guardian has simply sent the child back to the parent's care, precisely the result that was to be prevented by the appointment of a guardian as a "permanent" caretaker.

Economic factors also become problematic in many of these cases. A guardian is not required to expend his or her own funds to support a ward. MCL 700.431(1); MSA 27.5431. As a practical matter in protection cases, the individual who would be appointed a guardian is often a relative, most often a grandparent, who may well have economic difficulties of her or his own. Moreover, while the guardianship statute mandates what amounts to a treatment plan, there is no worker to facilitate procuring services and often there is no funding source for services to the parent, the guardian, or the child. If the court's Limited Guardianship Placement Plan or Court Structured Plan is not substantially different from the Parent Agency Treatment Plan in the child protection case, the court should be very cautious about appointing the guardian. These

1. The term "full guardian" is not contained in Michigan's guardianship statute but is used here to distinguish from a limited guardianship.

legal and practical problems can make financial support of the child in these cases problematic. Financial pressures, often unexpected on the part of the guardian, can lead to the guardianship being dissolved.

While a guardian may be an "ineligible grantee," entitled to receive basic public benefits for the child, these funds are minimal (AND MAY BE TIME LIMITED UNDER THE TANF PROGRAM). They are considerably less than that which a foster care provider is entitled to or which would be provided by an adoption subsidy. This concern is magnified because so many of the children in protection cases have ongoing medical and mental health needs.

Review and termination of guardianship appointments also raise serious questions about their efficacy as a permanent resolution for a protection case. In appointing a legal guardian, the court assumes the burden of monitoring the case, possibly for years. MCL 700.424b(1); MSA 27.5424(2)(1). For a child under six, the court must review a guardianship at least once per year. In the case of children older than six, the court may review the guardianship as it deems necessary or at the request of one of the parties. *Id.* Given the limitations on the court's resources, in many jurisdictions these reviews are cursory at best. Often the guardian simply fills out a form and sends it to the court.

In some circumstances, the appointment of a guardian is the first step in the process to termination of parental rights. See MCL 712.19b(3)(d), (e), and (f); MSA 27.3178(598.19b)(3)(d), (e), and (f). The court will have gained little if two years after institution of a "permanent" guardianship, the court is faced with a petition filed by a guardian to terminate parental rights.

Guidelines for Appointment of a Guardian to Resolve a Child Protection Case

What follows is an attempt to provide some guidance for the appointment of a legal guardian as an alternative "permanent" resolution to a child protection matter. If the court appoints a guardian under such a circumstance, the court should treat the matter as though the guardianship is intended to be in place until the child turns eighteen. The parties should understand and agree to this requirement. Additional guidelines:

1 Guardianship should be used only in cases where parents clearly will be unable to provide for the welfare of the child over the long term. If guardianship is to be used as an alternative to termination of parental rights and adoption, it should not be used in cases where there is a realistic possibility of the parents regaining custody of their child. Thus, the parents' inability would give rise to the establishment of a "permanent" placement in guardianship.

2 Guardianship should not be used simply as a means to resolve a case or because there is a relative or other person who is willing to take the child and unburden "the system."

3 The Juvenile Code makes clear that the court may both appoint a guardian and keep the child protection case open. MCL 712A.18(1)(h); MSA 27.3178(598.18)(1)(h). The court should give careful consideration to maintaining both the guardianship case and the child protection case on its docket, at least for a length of time sufficient to satisfy itself that the guardianship arrangement is working for the child.

4 Guardianship should not be used to resolve young children's cases (children under 12).

5 If the child over whom guardianship is being considered is 14 or older, that guardianship should not be put in place unless the child consents to the establishment of the guardianship.

6 Guardianship should be used only very cautiously with children who have special needs. It is

essential to remember that there will not be a subsidy to meet a child's needs in a guardianship situation.

7 An agency should never be made legal guardian of a child. A guardian should be a person or persons, preferably who have a demonstrated commitment to the child and her or his welfare.

8 The court should consider the age of the proposed guardian. While an elderly relative may desire to provide for a child's long-term welfare, the court should carefully consider whether the proposed guardian will in fact be able to raise the child until the child is an adult.

9 Guardianship may be a viable option for older children who would otherwise stay in the child welfare system until released to themselves as young adults. (E.g., older Michigan Children's Institute wards for whom there is no viable plan for adoption.)

Conclusion

While in some cases guardianship may provide a viable alternative to termination of parental rights as a means of achieving a stable home for a child, practitioners are advised to proceed cautiously when considering such a resolution. Failure to carefully consider both the legal and practical impact of appointing a guardian could result in the opposite of that which is desired: unclear spheres of authority between parents, guardians, and children, continuing struggles within already dysfunctional families, ongoing legal battles, and economic hardship. In short, chaos in the life of the child.

BENCHNOTE 8

Foster Care Review Board

by Tom Kissling
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Citizen Review

The Foster Care Review Board Program is a system of third party review, which was established by the Michigan State Legislature in an effort to improve children's foster care programs throughout the state. The Program is administered by the State Court Administrative Office of the Michigan Supreme Court and consists of citizen volunteers who are recruited, screened, and trained by program staff.

The idea for third party citizen review resulted from the perception that abused/neglected children entering the child welfare system "drifted" in a temporary state without a permanent plan and accompanying action steps. Although the Family Division of Circuit Court, Family Independence Agency (FIA), and private child placement agencies all play major roles in addressing children in care, it is difficult for any one of them to provide an objective assessment of the foster care system. Local citizen review boards are in a unique position to look at the activities of these primary players in the foster care system.

Legal Basis

There is a basis for third party citizen review in Public Laws 96-272, the Adoption Assistance and Child Welfare Act of 1980, and 105-89, the Adoption and Safe Families Act of 1997. These federal laws provide standards for child welfare in the states as conditions to receive federal funding. Each child in foster care must have a semiannual administrative review which can be conducted by the court or another body. This

review must be open to the participation of the parents of the child and conducted by a panel of appropriate persons. At least one of the panel members must be responsible for the case management of, or delivery of services to, either the child or the parents who are the subject of the review.

In Michigan, 1984 Public Act 422, as amended by 1986 Public Act 159, 1989 Public Act 74, and 1997 Public Act 170, provides the basis for the Foster Care Review Board Program.

Board Operation

What are foster care review boards and how do they operate? Local review boards consist of five volunteer citizens who have been recruited, screened, and trained by the State Court Administrative Office. The volunteers meet one day per month in their respective communities to review the cases of four to six sibling groups of children who are in foster care because of abuse or neglect.

A random sample of cases is selected for review from an FIA master list which is provided to the Foster Care Review Board Program offices. The FCRBP offices then request specific cases from local county FIA offices, copy the materials, and mail them to each board member prior to the review.

Each case review is conducted in three stages. The first stage involves the board volunteer reading the written materials prior to the hearing which detail the reason(s) for out-of-home placement, and the agency's plan for services to the child and family. The second stage is an in-person interview with persons defined as interested parties in the case. Interested parties include caseworkers, biological parents, foster parents, and, if appropriate, the child(ren). Additionally, therapists, attorneys, grandparents, and others often attend reviews.

During the third stage of the review process, the board compiles finding of fact and makes **advisory** recommendations regarding each case reviewed. These findings and advisory recommendations are provided to the Family Division of Circuit Court, FIA, private agencies, prosecuting attorney, and interested parties. The court may use the findings at its discretion. Final decision-making authority with regard to the care of a child in foster care always rests with the Family Division of Circuit Court.

Once selected for review, cases continue to be reviewed every six months until a permanent plan is achieved.

With the passage of 1997 PA 163 and 170, foster care review boards were given the added responsibility of reviewing foster parent appeals when foster parents are not in agreement with the movement of wards from their homes.

Volunteer Board Members

What is unique about Foster Care Review Board volunteers? They are the backbone of the Program. There are thousands of people involved in the child welfare system—children, parents, foster parents, social workers, psychologists, nurses, doctors, teachers, law enforcement officers, attorneys, therapists, counselors, and judges. Except for children and parents, each of these groups has an official role to fulfill in addressing children and families caught up in the foster care system. Each has a vested interest. Volunteers who serve on boards are different. Volunteers have neither an official role nor a vested interest. Yet, they are authorized a unique look at the foster care system through their role in the Foster Care Review Board Program.

Significance of Boards

How can local board reviews affect the greater child welfare system? Within the Foster Care Review Board Program there is a statewide Advisory Committee. The Advisory Committee is composed of representatives of local boards and others in the child welfare community who are appointed by the State Court Administrator. Data collected from local board reviews is used by the Advisory Committee to advocate for children at the county, state, and federal levels. Advocacy can be with the Family Division of Circuit Court, FIA, legislature, elected officials, or other community groups.

Most people would agree that children in care have the right to quality reviews of their circumstances. Although courts and social service agencies bear the burden of determining and carrying out plans for foster children, in settings often closed to public scrutiny, citizen reviewers are in a unique position to not only review the progress of children in the system, but speak out knowledgeably. Through their review of case materials and interviews with parents, foster parents, caseworkers, attorneys, and children, they acquire a unique perspective of the problems and barriers which hinder permanent placement for children. By pooling their knowledge of foster care, they provide a springboard to advocacy for children—locally, statewide, and nationally.

Summary

Citizen involvement in foster care review is beneficial in several ways. First, citizen reviews develop an awareness of the foster care system and consequently can help educate the community. Second, over time, citizen reviewers become a constituency for children and advocate for their needs with the agency, court, their own families, the legislature, and the community. Third, citizen reviewers bring a quality control aspect to the foster care system. Finally, citizen participation in case reviews open the system to the community, thus broadening the base of accountability for public services for children.

Citizen review assists the courts, FIA, and others to facilitate permanent placements for foster children in a progressive, timely manner.

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